UNITED NATIONS **S**

Security Council

Distr.
GENERAL

S/1999/912
25 August 1999

ORIGINAL: ENGLISH

LETTER DATED 25 AUGUST 1999 FROM THE PRESIDENT OF THE INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991 ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

I have the duty to report to the Security Council the refusal of the Republic of Croatia to cooperate with the International Tribunal, as required by the Tribunal's Statute. The reasons for making this request are twofold. First, the refusal of the Republic of Croatia to recognize the Tribunal's jurisdiction over alleged criminal activity occurring during and in the aftermath of "Operation Flash" and "Operation Storm". Second, the continuing refusal of the Republic of Croatia to surrender and transfer Mladen Naletilić (also known as "Tuta"), who has been indicted by the Tribunal.

On 28 July 1999, I received a "Request by the Prosecutor under rule 7 bis (B) that the President Notify the Security Council of the Failure of the Republic of Croatia to Comply with its Obligations under Article 29" ("the Request").

The Request relates, inter alia, to the failure of the Republic of Croatia to provide evidence and information sought by the Prosecutor concerning Operation Flash and Operation Storm. The Prosecutor has sought this evidence and information so that an investigation may be conducted into alleged criminal activity occurring in conjunction with and immediately after those campaigns. The Republic of Croatia has failed to cooperate in that investigation by refusing to provide documents requested by the Prosecutor. Although a Trial Chamber is the final arbiter of whether those campaigns fall within the International Tribunal's jurisdiction, a State may not under the Statute and international law refuse to cooperate because of its unilateral determination that the subject of the investigation is not within the jurisdiction of the Tribunal.

Mr. Naletilić was indicted by the International Tribunal on 21 December 1998. He was apparently convicted in the Republic of Croatia for crimes unrelated to the charges as set forth in the indictment of the Tribunal. He is currently in Croatian custody awaiting sentencing for the crimes of which the Croatian court convicted him. The Republic of Croatia has refused requests by the Prosecutor to transfer him to the Tribunal. Article 29 (2) (e) of the

Tribunal's Statute requires States to comply without undue delay with any request for assistance for the transfer of the accused to the Tribunal.

The International Tribunal's Rules of Procedure and Evidence provide, under rule 7 bis (B), that when the Prosecutor satisfies the President of the Tribunal that a State has failed to comply with its obligations under the Tribunal's Statute, "the President shall notify the Security Council thereof". I have made a finding, pursuant to rule 7 bis (B), that the Republic of Croatia has failed to meet its obligations under article 29 of the Statute of the Tribunal. These findings are set forth in the attached letter to the Prosecutor dated 25 August 1999.

The Security Council created the International Tribunal to investigate and prosecute persons responsible for some of the most horrific violations of international humanitarian law. As a subsidiary organ of the Security Council, and because the Tribunal lacks mechanisms to enforce State compliance, we rely on the Security Council to bring non-cooperating States into compliance. I respectfully urge you to provide the support necessary to enable the Tribunal to discharge its mandate. To this end, I respectfully request the Security Council to take measures that are sufficiently compelling to bring the Republic of Croatia into compliance with its obligations under international law.

(Signed) Gabrielle KIRK McDONALD
President

Annex

Letter dated 25 August 1999 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 addressed to the Prosecutor of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991

On 28 July 1999, your office submitted a Request under Rule 7 bis (B) (hereinafter, "the Request") formally requesting that I notify the Security Council that the Republic of Croatia has failed to meet its obligations under article 29 of the Statute of the Tribunal. In this regard, the Republic of Croatia has sent two letters to me, dated 23 July 1999 and 30 July 1999, for my consideration. Having considered the relevant materials, the Statute, and the Rules of Procedure and Evidence, I herewith set forth my conclusions.

In the Request, which includes four annexes, you raise three primary issues for my consideration: (1) the alleged failure of the Republic of Croatia to respond to your numerous requests for evidence and information, particularly the "Consolidated Request"; (2) the alleged refusal of the Republic of Croatia to accept the jurisdiction of the Tribunal over crimes committed during and in the aftermath of operations "Flash" and "Storm"; and (3) the alleged failure of the Republic of Croatia to surrender and transfer two individuals indicted by the Tribunal. Each of these points will be discussed separately.

With respect to the history of requests for assistance, you indicate that to date your office has forwarded 119 requests of various kinds to the Croatian Government. You acknowledge that the Republic of Croatia has complied with most of your requests for assistance with the production of evidence (Request, para. 2). However, based on the assertions in paragraphs 2 to 5 and 9 of the Request, it appears that the Republic of Croatia has failed to fully comply with all of your requests for such assistance. As a result of the failure of the Republic of Croatia to respond to all of your requests, your office prepared a "Consolidated Request" on 22 June 1999. This Consolidated Request listed and formally renewed 13 outstanding requests for assistance. You requested the Croatian authorities to respond within three weeks from the date of the Consolidated Request. You state that no response has been received from the Croatian authorities (Request, para. 9).

The Statute, Rules of Procedure and Evidence and case law of the Tribunal provide mechanisms governing the conduct of investigations. For example, article 29 (2) requires States to comply without undue delay with any request for assistance or an order issued by a Trial Chamber for the production of evidence. Rule 39 (iv) provides that, "In the conduct of an investigation, the Prosecutor may request such orders as may be necessary from a Trial Chamber or a Judge". Similarly, rule 54 permits a Judge or Trial Chamber to issue orders and subpoenas "as may be necessary for the purposes of an investigation or for the preparation or conduct of the trial".

In the present matter, the Republic of Croatia contends that some of the requested documents relate to its national security. As you are aware, in the Blaškić case, the Appeals Chamber in its 29 October 1997 Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997 ("Blaškić Judgement") provided explicit guidelines concerning orders to States regarding evidence that States may wish to withhold on national security grounds. That Judgement was rendered in the context of an ongoing trial; however, many of the guidelines nevertheless apply in the present situation. Although a State may not unilaterally assert national security claims and thereby refuse to surrender requested documents, the Appeals Chamber acknowledged that "in camera, ex parte proceedings might be held so as to scrutinize the validity of States' national security claims" (Blaškić Judgement at para. 67). It also suggested modalities for making allowance for national security claims.

At present, there are numerous binding orders directed at the Republic of Croatia that have been challenged, some of which are pending before the Tribunal, including a Request for Review by the Republic of Croatia pursuant to rule 108 bis. Under these circumstances, the better approach is to utilize rule 39 (iv) and request a binding order from a Judge. That Judge would then apply the guidelines from the Blaškić Judgement. In accordance with that Judgement, the Republic of Croatia would be permitted to assert its national security claims. Further, this procedure would allow a Judge to compare the many requests made before other Chambers and the action taken regarding such requests.

This approach is also consistent with the position you advanced before the Appeals Chamber in the Blaškić Judgement case, in which you stated that "[A]s a matter of policy and in order to foster good relations with States, ... cooperative processes should wherever possible be used, ... they should be used first, and ... resort to mandatory compliance powers expressly given by article 29 (2) should be reserved for cases in which they are really necessary". (Blaškić Judgement at para. 31, citing to Prosecutor's Brief at p. 15.) In the Request, you state that some requests for documents have been pending since 1995.

Therefore, at this stage I decline to make a finding that the Republic of Croatia is in non-compliance with its obligation to provide evidence and information to the Tribunal as it pertains to the Consolidated Request.

The second issue raised concerns the specific cases of operations Flash and Storm and the alleged refusal of the Republic of Croatia to accept the Tribunal's jurisdiction over crimes committed during and in the aftermath of those operations (Request, paras. 6-8). You indicate that your office has determined that such alleged crimes "fall properly within the jurisdiction of the Tribunal in all respects" (Request, para. 7). Consequently, your office is investigating crimes that allegedly occurred in connection with those operations.

I note that your position is not that I review your decision to initiate an investigation with respect to operations Flash and Storm. This position is consistent with the reasoning set forth in my letter to you of 16 March 1999,

with respect to your Request pursuant to rule 7 bis (B) concerning the Federal Republic of Yugoslavia. I agree and reiterate that it is neither necessary nor appropriate for the President to review, in the context of rule 7 bis (B), the Prosecutor's decision that there is a sufficient basis to initiate an investigation under article 18 of the Statute. In reaching this conclusion, I refer to article 16 (2) of the Statute that provides that the Prosecutor shall act independently as a separate organ of the Tribunal and article 18 of the Statute which provides that the Prosecutor "shall initiate investigations". It is clear from the plain meaning of these provisions that only the Prosecutor may initiate investigations and that the President has no role in this regard. Moreover, because rule 7 bis (B) cannot be interpreted or applied in a manner that is inconsistent with the Statute, I do not have the authority to conduct a review of the appropriateness of your decision to investigate operations Flash and Storm - or any other investigation.

You indicate that the Republic of Croatia has "unilaterally refused to provide certain information requested by the Prosecutor" in relation to these "campaigns" (Request, para. 6). The eventual determination of whether the alleged crimes committed during the course of these operations is within the jurisdiction of the Tribunal is obviously for a Trial Chamber to make. However, the Statute and Rules of Procedure and Evidence clearly do not permit a State to thwart the conduct of an investigation by simply asserting that the Tribunal has no jurisdiction. Article 18 (2) of the Statute allows the Prosecutor to seek the assistance of the State authorities concerned as she collects evidence. Article 29 (1) imposes an obligation on States to cooperate with the Tribunal in its investigations and prosecutions. Consequently, I find the Republic of Croatia to be in non-compliance with its obligations under article 29 of the Statute with respect to its refusal to provide evidence pertaining to Operation Flash and Operation Storm on the asserted ground that the Tribunal lacks jurisdiction. The specific requests, however, are also subject to the guidelines set forth by the Appeals chamber in the Blaškić Judgement.

The final issue for consideration is the alleged failure of the Republic of Croatia to surrender and transfer two individuals indicted by the Tribunal and in the custody of the Republic of Croatia. One of these individuals, Vinko Martinović (also known as "Štela"), was transferred to the custody of the Tribunal on 9 August 1999, after the Request was made. Therefore, with respect to that accused, the Republic of Croatia is now in compliance with its obligations under article 29 of the Statute. Thus, the following discussion pertains to the transfer of Mladen Naletilić (also known as "Tuta") only. Mr. Naletilić was indicted on 21 December 1998. He was apparently convicted in the Republic of Croatia for crimes unrelated to the charges as set forth in the indictment of the Tribunal. He is currently in Croatian custody awaiting sentencing for the crimes of which the Croatian court convicted him.

Article 29 (2) (e) requires States to comply without undue delay with any request for assistance for the surrender or the transfer of the accused to the Tribunal. You have made such a request for assistance to the Croatian authorities and yet they have not transferred Mr. Naletilić, notwithstanding the fact that he is in their custody. Consequently, I find that the Republic of Croatia is in non-compliance with its obligation pursuant to article 29 with respect to the surrender and transfer of Mr. Naletilić.

In conclusion, I find that the Republic of Croatia is in non-compliance with its obligations under article 29 of the Statute with respect to (1) its refusal to provide the evidence requested relating to Operation Flash and Operation Storm based on its assertion that the Tribunal lacks jurisdiction over these campaigns and (2) its failure to surrender and transfer Mladen Naletilić (also known as "Tuta"). Consequently, I shall report this non-compliance to the Security Council pursuant to rule 7 bis (B).

(Signed) Gabrielle KIRK McDONALD
President